



Commercial and Consumer Tribunal

CITATION: *HOWARD v FGY PTY LTD T/A PROPERTYWISE KAWANA WATERS (UNDER EXTERNAL ADMINISTRATION) & GEORGE* [2009] CCT PC025-08

PARTIES: HOWARD John & Lorraine

V

FGY PTY LTD T/A PROPERTYWISE KAWANA WATERS (UNDER EXTERNAL ADMINISTRATION)
&
GEORGE Helene

APPLICATION NUMBER: PC025-08

DELIVERED ON: 9 March 2009

DELIVERED AT: Brisbane

HEARING DATE: 4 March 2009

DECISION OF: Mr J Thomas AM QC

Claim on PAMDA Fund – Trust account defalcation by real estate agent.

CATCHWORDS: Form of order – service direction designed to avoid departmental delay in making payment through combination of section 92 of the *Commercial and Consumer Tribunal Act 2003* and section 489(2)(a)(ii) of *Property Agents and Motor Dealers Act 2000*

REPRESENTATION:

APPLICANTS: Mrs L Howard

FIRST AND SECOND RESPONDENTS: No appearance

DECISION CATEGORY CLASSIFICATION: B

NUMBER OF PARAGRAPHS: 15

REASONS FOR DECISION

Introduction

1 This is a claim against the fund established under section 408 of the *Property Agents and Motor Dealers Act 2000* (“the PAMD Act”). It is based upon misappropriation of a trust fund by a real estate agent.

2 I am satisfied that both respondents were duly served with the application, the applicants’ affidavits and the notice of hearing. In the event, neither of the respondents appeared before me and the hearing proceeded in their absence.

3 The corporate respondent (“FGY Pty Ltd”) was under external administration when the proceedings commenced, and it is now in liquidation. On 10 September 2008, the receiver (“Kordamentha”) was appointed official liquidator by the Family Court of Australia. The respondent, Helene George, was the sole director of the company which was, at material times, a registered real estate agent, and she was the company’s principal licensee. Both respondents are “*relevant persons*” under section 469 of the PAMD Act.

4 On 17 January 2008, the applicants entered into a contract to sell their property to persons named Fischer. The respondent company was their agent and the deposit of \$53,500.00 was paid into the company’s trust account.

5 The sale was settled on 11 February 2008 and after deducting commission, outlays and charges, the respondents gave the applicants a cheque for \$35,224.50 as their balance entitlement.

6 The cheque was dishonoured. This was followed by many promises from Ms George to repay, all of which were broken, other than for a payment of \$15,000.00 on 1 April 2008. This left a deficit of \$20,224.50.

7 Receivers were appointed to the company, and the respective real estate licenses were cancelled by the Office of Fair Trading. The receivers contacted all known claimants and ascertained a substantial deficit in the trust account. The applicants were unable to obtain any further payment from or on behalf of the respondents.

8 They therefore brought this claim on 12 May 2008, well within the time provided for the making of a claim on the fund.

9 The receivers reported that the company was insolvent and its business unviable.

10 Plainly the monies in question were stolen, misappropriated or misapplied by the company which was at all material times under the direction of Ms George. The claim falls within the terms of section 470(1)(e) of the PAMD Act.

11 The applicants’ financial loss is \$20,224.50. Initially an additional claim was made for interest on that sum, but under section 492(5) of the PAMD Act no interest is payable.

Findings

12 I find that an event mentioned in section 470(1) happened, and that the claimants suffered financial loss in the sum of \$20,224.50 because of the happening of that event and name the **first and second respondents** as the persons liable for the claimants’ financial loss.

13 The claim should be allowed in the sum of \$20,224.50.

Conclusion

14 Delay sometime occurs in making payments from the fund when (as here) a respondent has not appeared at the hearing. The combination of section 92 of the *Commercial and Consumer Tribunal Act 2003* (“the CCT Act”) (decision not taking effect in such a case until absent parties are served) and section 489(2)(a)(ii) of the PAMD Act (payment not to be made until expiry of period allowed for appeal) can lead to uncertainty within the department as to when the payment should be made. To assist in achieving finality in this matter I shall include a direction to facilitate calculation of the appropriate period.

15 The order will be that the decision be deemed to have been served on the respondents three days after the posting of it to their last known respective addresses. As it is the Tribunal’s practice to do so on the date upon which its decision is published, this should assist in determination of the date by which the payment may properly be made to the applicants. Unless there is some unforeseen event, the delay should be limited to three days for service and a further 28 days for expiry of the time for appeal.

MR J THOMAS AM QC
MEMBER
Commercial and Consumer Tribunal